BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

TIMOTHY H. WILLIAMS	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,055,087
JAMES VOEGELI CONSTRUCTION INC.	)	
Respondent	)	
AND	)	
	)	
MIDWEST BUILDERS CASUALTY MUTUAL CO.	)	
KANSAS BUILDING INDUSTRY WC FUND	)	
NETHERLANDS INSURANCE CO.	)	
Insurance Carriers	)	

ORDER

Respondent and Midwest Builders Casualty Mutual Co. (Midwest) request review of the March 21, 2012 preliminary hearing Order entered by Administrative Law Judge John D. Clark.

ISSUES

The Administrative Law Judge (ALJ) issued an Order on July 14, 2011, finding that claimant had suffered a series of injuries which arose out of and in the course of his employment with respondent through December 15, 2010. There was no appeal from that Order.[1] In a subsequent Order dated March 21, 2012, the ALJ found that the March 20, 2012, medical opinions of Dr. Matthew Henry did not change the Court's "legal conclusion" in its Order of July 14, 2011. Dr. Henry was ordered to continue as the authorized treating physician and his recommended surgery was authorized.

Respondent and Midwest request review of the ALJ's March 21, 2012, Order arguing that claimant's need for medical treatment stems from the original accident on January 28, 2008, and not from claimant's continued employment with respondent through December 15, 2010. Respondent and Midwest, in their brief to the Board, stated many times that the evidence shows that the injury in question stems from the accident of January 28, 2008, and not from an "occupational disease" as defined in K.S.A. 44-5a01(b).

[1] At the Preliminary Hearing on July 14, 2011, the parties agreed that claimant suffered a compensable work-related accident on January 28, 2008.

The Brief goes on to state that under the "last exposure" rule, the ALJ held Midwest responsible to pay all benefits.[2] Neither of the above identified ALJ Orders mention occupational disease or the last injurious exposure rule.

Respondent and the Kansas Building Industry Work Comp Fund (Kansas Builders) argue that the Order of March 21, 2012, should be affirmed as claimant's physical condition worsened as the result of his continued work for respondent through his last day of work on December 15, 2010.

Insurance coverage for respondent was provided by Kansas Builders through either May 7, 2010[3], or May 25, 2010.[4] At that point, Midwest began to provide workers compensation insurance coverage for respondent. This confusion in coverage dates will only present a problem if this Board Member finds a second date of accident between May 7 and May 25, 2010.

Claimant argues that the Board doesn't have jurisdiction to consider the date of accident in an appeal from a preliminary hearing order. In addition, as there was no appeal from the original Order on July 14, 2011, the issue is resolved until the time of the final award. Claimant argues that the Order of March 21, 2012, is no more than a continuation of the order for medical treatment.

The issues in this matter are:

1. Did claimant suffer personal injury by accident or by a series of accidents which arose out of and in the course of his employment with respondent?

2. Does the Board have jurisdiction to decide the date of accident in this matter? If so, did claimant suffer only one traumatic accident on January 28, 2008, or did claimant suffer a second date of accident as a series pursuant to K.S.A. 44-508(d)?

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[2] Application for Review at 2 (filed Mar. 29, 2012).

[3] P.H. Trans. (Jul. 14, 2011) at 5.

[4] P.H. Trans. (Mar. 20, 2012) at 4.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be modified to find that claimant suffered a series of accidental injuries with a date of accident of January 9, 2009. The remainder of the Order of March 21, 2012, remains in full force and effect.

Claimant was employed as a working supervisor for respondent's construction company. On January 28, 2008, he was attempting to move a plate compactor when he slipped on mud and twisted his lower back. Claimant suffered immediate pain. He testified that the condition "every day from then on it just became worse and worse and worse, medication didn't do anything...".[5]

Claimant was referred by respondent to OccMed Associates, P.A. for an examination on February 6, 2008. There he was examined by Ronald Davis, M.D. Dr. Davis diagnosed an acute lumbar sprain and returned claimant to work with a lifting limit of 10-15 pounds with limited bending. As claimant was a supervisor, he was able to limit his lifting. Claimant testified that the treatment with Dr. Davis provided no relief. Claimant, on his own, sought treatment with Jamie L. Stinemetz, B.S., D.C., of the Andover Spine & Health Center, from June 30, 2008 through December 15, 2008. In the report of December 15, 2008, claimant was limited to no lifting over 65 pounds, especially with repetitive motion. He was also to avoid standing in one position for longer than 1 hour. Those restrictions were to last for two weeks.

On December 22, 2008, as the result of a referral by respondent, claimant was examined by Mark S. Dobyns, M.D., of the Wichita Clinic, P.A. Claimant provided a history of the slip in the mud and presented with mild low back pain, intermittent. An MRI was obtained on January 6, 2009, which displayed a mild disc bulge at L1-2, mild disc desiccation at L2-3, a central minimal bulge at L3-4, a central and circumferential bulge with minimal encroachment on both right and left at L4-5 and a central and posterolateral bulge with protrusion on the right at L5-S1. On January 9, 2009, claimant returned to Dr. Dobyns reporting that he felt a bit better. The discomfort remained, but the radiculopathy and weakness were gone. Dr. Dobyns recommended limited duty, including a 20 pound restriction and physical therapy.

Dr. Dobyns examined claimant on April 3, 2009. As neither therapy nor medications had lessened claimant's symptoms, it was recommended that claimant consider epidural steroid injections.

On April 13 and 27, 2009, claimant underwent epidural steroid injections at L4-5 and L5-S1, under the care of Amitabh Goel, M.D., also of the Wichita Clinic. Additional

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[5] P.H. Trans. (Jul. 14, 2011) at 8.

injections were administered by Dr. Goel on May 11, 2009, at the same levels. Claimant reported to Dr. Dobyns on June 24, 2009, that the injections helped somewhat, although claimant still reported pain. Claimant expressed a desire to return to his regular duty, but was concerned about possible lifting and bending.

Claimant returned to Dr. Dobyns on November 14, 2009, with recurrent symptoms in his low back. Additional epidural injections were administered by Dr. Goel on November 23, 2009, at L4-5 and again at L4-5 and L5-S1 on December 7, 2009. Claimant reported on February 12, 2010, that he had experienced significant improvement after the series of injections. On March 1, 2010, Dr. Dobyns returned claimant to full duty, with the caution to not do anything heavy. Pelvic traction was recommended in an attempt to reduce claimant's symptoms even further.

A second Employer's Report of Accident was filed with the Division on March 23, 2010, claiming a second injury to claimant's low back on that same date, suffered while claimant was pulling wire. However, no E-1 was filed for that accident. Claimant was returned to Dr. Dobyns for additional treatment for this new accident and for the continued problems from the January 28, 2008 accident. Claimant reported discomfort and radiculopathy on the right side. Claimant was taken off work for a few days with a plan to refer him to a surgeon if improvement was not noted. On March 29, 2010, claimant reported some improvement. However, Dr. Dobyns expressed concern with claimant's ability to continue in the construction business. He recommended claimant consider looking for an alternative career.

Miraculously, claimant presented to Dr. Dobyns on May 28, 2010, with no symptoms, no radiculopathy or weakness and a desire to return to full employment. Dr. Dobyns complied with claimant's request, but with a caution that claimant do more supervisory work and still consider a career change. Claimant continued working for respondent at his regular job until December 15, 2010, when he quit because he no longer could handle the pain. Claimant later testified that the return to regular duty release was requested from Dr. Dobyns due to a concern regarding claimant's continued employment. Claimant's concern came about as the result of a conversation in February or March of 2010, with his boss, Jim, who told claimant that perhaps claimant should find a new occupation, after claimant advised that his back was not improving.[6]

This matter went to preliminary hearing on July 14, 2011, to address claimant's request for ongoing medical treatment. The ALJ ordered respondent to provide the names of three physicians for selection of one by claimant for treatment. As the result of that Order, claimant chose board certified neurosurgeon Matthew N. Henry, M.D., in Wichita, Kansas as the authorized treating physician. Dr. Henry first examined claimant on December 6, 2011, with claimant reporting pain radiating down his right leg. An MRI of the

[6] P.H. Trans. (Jul. 14, 2011) at 27.

lumbar spine had been earlier ordered and was taken on November 1, 2011. The MRI showed neural foraminal narrowing at L4-5 and a large disc protrusion on the right at L5-S1. A right L4-5 medial facetectomy and right L5-S1 diskectomy were recommended. However, the surgery was denied by respondent.

Dr. Henry, in his report of February 14, 2012, stated that claimant's work injury in January 2008 is the "prevailing factor" for claimant's current need for surgery. This was based upon the fact that the right side radiculopathy, as noted by Dr. Davis in 2008, indicated a disc protrusion irritating the nerve root at that time. Dr. Henry noted that claimant's condition did not improve, and actually got worse. Dr. Henry testified that the current need for the surgery is due to the pressure on the nerve and the pressure was caused by the January 28, 2008 work injury. Dr. Henry was asked if he thought that the need for surgery was due to any sort of "occupational disease".[7] He agreed that, while he could not be one hundred percent, claimant's story was of an accident in January 2008, with pain going down his leg. He went on to agree that it could have been exacerbated by gravity, passage of time or activity. Dr. Henry had been provided with no prior medical records from Dr. Davis, the Andover Spine & Health Center, or any other treatment claimant had undergone. He, likewise was unaware of a claimed injury on March 23, 2010, while claimant was at work. Dr. Henry was also unaware of a note in the PT Plus medical records that claimant hurt his back on August 4, 2009, and was off work for two days. Dr. Henry agreed that his opinions were based upon what claimant had told him, and not upon claimant's medical records. Dr. Henry, on cross examination, stated "That story he gave me, it was going off the right side at that point in time. Could have been worsened by continued activity, yes, but the story is that he hurt his back in 2008, it grew worse."[8]

The matter again went to preliminary hearing on March 20, 2012. The ALJ, after reviewing the report and testimony of Dr. Henry, continued Dr. Henry as the authorized treating physician, with his recommended surgery. The March 21, 2012 Order stated that "Dr. Henry's medical opinions of March 20, 2012, do not change the Court's legal conclusion found in its Order of July 14, 2011." That Order found that claimant suffered an injury which arose out of and in the course of his employment with respondent with a date of accident each and every working day through December 15, 2010. This was claimant's last working day with respondent.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[9]

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[7] Henry Depo. at 13.

[8] Henry Depo. at 24.

[9] K.S.A. 44-501 and K.S.A. 44-508(g).

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[10]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[11]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[12]

In general, the question of whether the worsening of a claimant's preexisting condition is compensable as a new, separate and distinct accidental injury under workers compensation turns on whether the claimant's subsequent work activity aggravated, accelerated or intensified the underlying disease or affliction.[13]

It is noted that the parties do not dispute an initial date of accident by a single trauma on January 28, 2008. The dispute centers around claimant's continued employment with respondent and what if any aggravations claimant may have suffered. From the preliminary hearing of July 14, 2011, the ALJ initially found a separate date of accident as a series through claimant's last day worked on December 15, 2010. That initial July 14, 2011, Order was not appealed. The parties then returned to the ALJ for a second preliminary hearing on March 20, 2012, with respondent and Midwest Builders again disputing whether claimant suffered a single accident on January 28, 2008, or a series of accidents through claimant's last day worked, or a single date of accident followed by a series. The ALJ refused to change his earlier determination that the date of accident was

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[10] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[11] K.S.A. 44-501(a).

[12] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[13] *Boutwell v. Domino's Pizza*, 25 Kan. App. 2d 110, 959 P.2d 469, *rev. denied* 265 Kan. 884 (1998).

each and every working day through December 15, 2010, claimant's last day worked. There is no indication in either the July 14, 2011 Order or the March 21, 2012, Order whether a date of accident analysis was conducted pursuant to K.S.A. 44-508(d).

Not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to issues where it is alleged the administrative law judge exceeded his or her jurisdiction and the following issues which are deemed jurisdictional:

1. Did the worker sustain an accidental injury?

2. Did the injury arise out of and in the course of employment?

3. Did the worker provide timely notice and written claim of the accidental injury?

4. Is there any defense that goes to the compensability of the claim?[14]

A date of accident dispute between two insurance companies is not one over which the Board takes jurisdiction on appeal from a preliminary hearing order.[15] However, when the dispute centers around whether the claimant suffered personal injury by accident or by a series of accidental injuries, then jurisdiction is conferred upon the Board pursuant to K.S.A. 44-534a. The dispute herein centers around whether claimant suffered only one accidental injury on January 28, 2008, or a second series of accidental injuries after claimant returned to work for respondent. The Board has jurisdiction over the dispute regarding whether a second series of accidental injuries has occurred.

> In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident

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[14] K.S.A. 44-534a(a)(2).

[15] *White v Contemporary Communications, Inc.*, Docket No. 1,046,227, 2010 WL 517334 (Kan. WCAB Jan. 25, 2010).

> be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.[16]

Claimant suffered a specific trauma on January 28, 2008, and was initially treated by Dr. Davis. That was authorized medical treatment, but was confined to the single January 28, 2008, trauma. After only two examinations, claimant became dissatisfied with the treatment from Dr. Davis and sought medical treatment on his own with a series of chiropractors. Those treatments were clearly unauthorized.

Claimant then requested additional treatment from respondent and was referred by respondent to Dr. Dobyns. Once again, claimant was receiving authorized medical care.[17] When Dr. Dobyns examined claimant on January 2, 2009, claimant expressed a desire to remain at his regular duties. Dr. Dobyns agreed. However, at the followup examination on January 9, 2009, Dr. Dobyns determined that it would be in claimant's best interest to return to work at limited duties, including a 20-pound restriction. Therefore, pursuant to K.S.A. 44-508(d), if claimant has suffered additional traumas after the initial injury on January 28, 2008, the appropriate date of accident would be January 9, 2009.

The ALJ found that claimant's condition had worsened after the initial injury. His date of accident was not properly determined, but the added aggravation with claimant's return to work was properly determined and is supported by this record. Respondent and Midwest Builders argue that claimant suffered only a single accidental injury on January 28, 2008, with any worsening being a natural consequence of the initial injury. While it appears initially that the medical opinion of Dr. Henry would support a single date of accident, a closer read of his medical records and deposition testimony tells a different story.

On more than one occasion Dr. Henry identified the January 28, 2008 date of accident as the cause of claimant's ongoing problems. The doctor even went on to state the January date is the "prevailing factor" in claimant's need for medical care. This language, however, was not placed into the law until May 15, 2011, with the most recent revision of the Kansas Workers Compensation Act. Therefore, it would not apply to this circumstance. Dr. Henry modified his date of accident opinion somewhat when he stated that claimant's condition could have been aggravated by activity and that it "grew worse". This Board Member finds that claimant suffered a continued aggravation of his low back injury with his return to work for respondent. The date of accident, pursuant to K.S.A. 44-508(d) is January 9, 2009.[18] The Order of the ALJ is modified accordingly.

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[16] K.S.A. 2005 Supp. 44-508(d).

[17] P.H. Trans. (Jul. 14, 2011) at 21.

[18] *Saylor v. Westar Energy, Inc.*, 292 Kan. 610, 256 P.3d 828 (2011).

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[19] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant suffered personal injury by accident through a specific trauma on January 28, 2008, followed by a series of injuries. The date of accident for the series is January 9, 2009. The Order of the ALJ is modified accordingly. The remainder of the Order from March 21, 2012, remains in full force and effect.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge John D. Clark dated March 21, 2012, is modified to find that claimant suffered a series of accidental injuries with a date of accident on January 9, 2009, pursuant to K.S.A. 44-508(d). The remainder of the Order remains in full force and effect.

[19] K.S.A. 44-534a.

IT IS SO ORDERED.

Dated this _____ day of May, 2012.

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HONORABLE GARY M. KORTE
BOARD MEMBER

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